INTERIOR BOARD OF INDIAN APPEALS

Estate of Clara G. Moonlight

39 IBIA 119 (09/10/2003)

This decision has been redacted under 5 U.S.C. § 552(b)(6) by substituting initials for certain names.

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF CLARA G. MOONLIGHT	:	Order Affirming Decision
	:	
	:	Docket No. IBIA 03-15
	:	
	:	September 10, 2003

Appellant Robert E. French sought review of an August 30, 2002, decision denying rehearing entered in the estate of Decedent Clara G. Moonlight by Administrative Law Judge Richard L. Reeh. IP OK 162 P 97-1 (997-804-0331). Appellant sought rehearing of an August 30, 2001, order approving Decedent's will. For the reasons discussed below, the Board of Indian Appeals (Board) affirms Judge Reeh's decision.

The Probate Record contains five wills that Decedent executed over a 40-year period. Decedent executed the last two wills when she was 87 years old: A May 27, 1993, will named Appellant as Decedent's sole beneficiary, while a July 13, 1993, will named Appellee S. S. W. as sole beneficiary. Decedent died on May 2, 1996.

Judge Reeh held hearings to probate Decedent's trust estate on October 29, 1997; February 24, 1999; March 8, 1999; May 10, 1999; July 12, 1999; and October 18, 1999. A hearing was set for December 13, 1999, but the record shows that it was cancelled. During the hearings, many witnesses testified about Decedent and her relationships with both Appellant and Appellee.

Appellant contested Decedent's July 13, 1993, will on the ground that Appellee unduly influenced Decedent to change her will to name Appellee as the sole beneficiary. Although Appellant agreed that Decedent had the mental capacity to execute the will, he argued that because of Decedent's poor eyesight, she could not read the will and did not know what she was signing.

The scrivener of Decedent's July 13, 1993, will, who also served as a witness to that will, testified that she had prepared both the May 27 and July 13, 1993, wills; Decedent was by herself at the BIA office the day she executed the July 13, 1993, will; Decedent asked her to prepare a new will; Decedent waited alone while she prepared the will; she either read the will to Decedent or Decedent read it herself; Decedent was mentally competent to execute the will;

and Decedent was not unduly influenced in the execution of her will by anyone. Feb. 24, 1999, Tr. at 4-25.

The second witness to the July 1993 will agreed with the will scrivener's testimony, but also stated that she saw Appellant bring Decedent to the BIA office on July 13, 1993. Mar. 8, 1999, Tr. at 3-11. The notary public gave her opinion that the will was executed properly. Feb. 24, 1999, Tr. at 26-30.

In regard to the circumstances surrounding Decedent's mental and physical health, Appellant testified that Decedent told him he would get her entire estate; he suspected Appellee or her family were cashing Decedent's United States Department of Treasury (Treasury) checks; when Decedent moved in with Appellee, Appellee made Decedent dependent upon her; he was often denied the right to see Decedent when she was at Appellee's home; Decedent's eyesight and health were failing from 1993-1996, so much so that she did not remember executing a 1996 long-term lease of town property in favor of Appellee's daughter; and Appellee unduly influenced Decedent to change her will by stating Decedent could no longer live with Appellee unless she changed her will. Mar. 8, 1999, Tr. at 60-108.

On March 18, 1999, Appellant's counsel wrote to the Office of Trust Funds Management (OTFM), Office of Special Trustee, Department of the Interior, requesting processed and cancelled Treasury checks drawn between 1993 to 1995 against Decedent's Individual Indian Money account. On or about May 3, 1999, Appellant's counsel received an undated response from OTFM. OTFM stated that once it processed Decedent's checks, it returned the cancelled checks to Treasury. OTFM attached a list of 45 cancelled checks issued to Decedent by check number, date, and amount. Appellant's counsel forwarded all of this information to Judge Reeh on May 4, 1999.

The day after the May 10, 1999, hearing, Appellant's counsel wrote Treasury requesting the checks that OTFM had identified. Treasury responded on May 28, 1999, that it needed more information about the check descriptions to process the request. The letter stated that the office authorizing the checks should be able to assist in obtaining them.

On June 25, 1999, Appellant's counsel again wrote OTFM requesting the checks and enclosing Treasury's May 28, 1999, response. At the July 12, 1999, hearing, Appellant's counsel told the Judge about his difficulty in obtaining the checks. The transcript contains the following discussion between the Judge and Appellant's counsel concerning the relevance of the checks to Appellant's case:

[JUDGE]: Specifically, the relevance of the checks could be what?

[APPELLANT'S COUNSEL]: Okay. Your honor what's been placed in the

> record is testimony concerning the borrowing of monies by [Decedent]. The monies, basically as [Appellant] testified, borrowed by [Decedent]. I believe [Decedent] got a check for around $1,800 and was broke in a week when [Appellant] came to see her. That's one check. * * * .
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> So those checks we believe your honor will show and intend to prove, again, we can see the signatures on back of those checks. Quite possible those checks were negotiated by individuals other than the decedent. That would be one item of relevance. The other item of relevance would be the monies that were received by the decedent and then her being broke and borrowing money all the time from various individuals. But we're saddled [with] the burden of proof to prove that the will has been offered for probate was offered for probate and induced if you will by the [Decedent's] execution * * * cause[d] by the undue influence in over reaching. * * * So it's part of the element of over reaching, Judge, for the reason for the checks and if they are forged and I'm not saying that they are then that would [be] our position on that.

July 12, 1999, Tr. at 4-5. At the end of the hearing, the Judge stated that he would assist Appellant in obtaining the checks.

On July 13, 1999, Appellant's counsel sent to the Judge for his signature a sample generic letter that requested Decedent's Treasury checks. The record does not contain any information indicating that the Judge ever signed this letter or sent it to anyone.

In response to the requests of Appellant's counsel at the October 18, 1999, hearing and in Appellant's November 5, 1999, letter to the Judge, Judge Reeh sent counsel two signed, blank, original subpoenas dated November 8, 1999. The record contains only one of the subpoenas, which had been completed and served on OTFM. The record does not include a similar subpoena to Treasury.

On August 30, 2001, Judge Reeh issued an order approving Decedent's will. He found that the evidence showed that even though Decedent had poor eyesight, she had the testamentary capacity to execute a will, she knew what she was signing, and she did not act under undue influence.

On October 30, 2001, Appellant filed a petition for rehearing arguing that the Judge erred in deciding the case before the Treasury checks and their endorsements were entered into the record. Appellant stated that he had received copies of the Treasury checks in May of

2000. 1/ He alleged that Decedent's checks had been forged and that some of them were signed only by Appellee's daughter.

On August 30, 2002, Judge Reeh issued an order of modification and order denying Appellant's petition for rehearing. In regard to the checks, the Judge stated that he did not believe the checks would materially impact his consideration of whether Decedent's will should be approved, and that the testimony of the will scrivener, witness, and notary public was clear and would not be overcome by any evidence concerning the checks.

The Board received Appellant's notice of appeal on October 28, 2002, and certificate of service on November 22, 2002. Appellant contends that he was denied due process by not being afforded the opportunity to provide the Treasury checks and raises the same issues as he did in his petition for rehearing. He also argues that Appellee had "the capability and did in fact coerce and apply undue influence on [Decedent] to leave her Indian trust property to [Appellee]," Appellant's Oct. 24, 2002, Appeal at 2; the checks are newly discovered evidence; and the Judge erred in failing to consider the testimony of one of his witnesses, Wanda Owings.

On appeal, Appellant chose to rely on the record and his notice of appeal. No other briefs were filed.

The person challenging a probate decision bears the burden of proving error in that decision. Estate of Henry W. George, 15 IBIA 49, 50 (1986). Here, Appellant must show how the Judge erred in concluding that the checks were not material evidence to support Appellant's argument that Decedent's July 13, 1993, will was invalid.

Appellant argues that the checks would have shown that Appellee's daughter, or someone else, forged Decedent's signature, and that this fact would prove that Appellee had unduly influenced Decedent to change her will.

The Board disagrees. In order for the checks to have any relevance at all to the question of whether Appellee unduly influenced Decedent in the execution of her July 1993 will, there must be at least some connection between the checks and actions by Appellee. Appellant has not shown any such connection. Appellee testified that she had not signed any of Decedent's checks. May 10, 1999, Tr. at 39-41. Appellant did not counter this testimony. In fact, even on appeal, he has not provided copies of the cancelled checks. Appellant has not carried his burden of proving that the Judge erred by not waiting for the submission of the checks.

1/ The record contains neither information on whether the Judge ever received the checks, nor copies of any checks.

Even if the Board had found that the checks were material evidence, it might still have held against Appellant. Appellant asserts that the checks are newly discovered evidence that the Board should consider even though they were not presented to Judge Reeh. The first hearing in this estate was held in 1997. There is no information before the Board that Appellant began efforts to obtain the checks before the February 1999 hearing. The Judge set supplemental hearings to allow Appellant the opportunity to obtain and present the checks, and supplied subpoenas for them. There is no indication in the record that Appellant's counsel ever served the subpoena addressed to Treasury, even though he had been told that Treasury had the checks and what information Treasury needed in order to locate them. Appellant's counsel now states that he received the checks in May 2000. However, there is no indication that he either furnished the checks to the Judge or requested another hearing at which to present them in the 15 months between May 2000 and the issuance of the Judge's decision in August 2001. As noted above, the checks have still not been provided to the Department. This evidence is not, as Appellant asserts, newly discovered. In fact, the Board cannot even find that it is newly obtained.

The Board next addresses Appellant's argument that the Judge erred when he found that Decedent was not unduly influenced by Appellee to change her will. The Board has summarized the long-established rules concerning proof of undue influence upon an Indian testatrix:

> Normally, to invalidate an Indian will on the grounds of undue influence, it must be shown that (1) Decedent was susceptible of being dominated by another; (2) the person allegedly influencing Decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon Decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to Decedent's own desires. E.g., Estate of Joseph Poolaw, 18 IBIA 358 (1990). Further, the burden to prove undue influence is upon the will contestant. E.g., Estate of Alice Jackson (John), [17 IBIA 162 (1989)].

Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA 205, 207 (1991).

Judge Reeh here found that:

> Evidence in this record shows that, on July 13, 1993, in spite of [Decedent's] advanced age, her poor eyesight and her need to sometimes use a wheel chair, she was clear of mind, independent of spirit and--with the help of others--able to come and go as she pleased.
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> In this case, the will is valid on its face. A properly executed Affidavit to Accompany Indian Will was attached to the testamentary document. The burden is on opposing parties to prove, by a preponderance of admissible

> evidence, that such a will is not valid. I cannot determine that [Appellant] has made such a showing. The evidence does not demonstrate that [Decedent] was susceptible to being dominated by any other person. Moreover, although [Decedent] was shown to have very poor eyesight, the evidence preponderates in favor of finding that she knew what she was signing on July 13, 1993. Nothing suggests she was tricked by [BIA] agency employees * * * into signing a will she did not wish to make.

Aug. 31, 2001, Order at 3.

The crucial time to determine the decedent's state of mind is the day that the will is executed. Estate of Leona Ketcheshawno Waterman Ely, 20 IBIA at 209. The will scrivener, witness, and notary public testified that Decedent was mentally competent and was not unduly influenced by anyone on July 13, 1993. Appellant presented no evidence to the contrary. The Board finds that Appellant has not carried his burden of proving that Judge Reeh erred in concluding that Decedent was not unduly influenced in the execution of her July 13, 1993, will.

Appellant's last argument is that the Judge erred by not properly considering the testimony of one of his witnesses. Appellant's witness testified about a conversation she had with Appellee around June 3, 1993. The witness testified that Appellee said that because she knew Decedent had left her estate to Appellant, she told Decedent to tell Appellant that he should take care of Decedent. Mar. 8, 1999, Tr. at 35-37.

Assuming for purposes of this discussion only that Appellee made the statement attributed to her, that statement shows, at most, that Appellee was unhappy about the fact that Appellant was to take Decedent's estate, but was not caring for her. It does not show that Appellee even attempted to influence Decedent to change her will. The Board finds that Appellant has not shown that Judge Reeh erred in not giving more weight to this testimony.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Reeh's August 30, 2002, order dismissing petition for rehearing is affirmed.

//original signed	//original signed
Kathleen R. Supernaw	Kathryn A. Lynn
Acting Administrative Judge	Chief Administrative Judge